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In The Supreme Court of the United States

UNITED STATES OF AMERICA,
EX REL. THORNTON G. SANDERS,
Petitioner,

v.

NORTH AMERICAN BUS INDUSTRIES, INC.;
DELOITTE & TOUCHE USA, LLP;
NORTH AMERICAN BUS INDUSTRIES KFT.,
Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

BRIEF IN OPPOSITION

James P. Ulwick
Counsel of Record
KRAMON & GRAHAM, P.A.
One South St., Ste. 2600
Baltimore, MD 21202
(410) 752-1269

Melissa H. Maxman
Ronald F. Wick
BAKER & HOSTETLER LLP
Washington Square, Ste. 1100
1050 Connecticut Ave., N.W.
Washington, DC 20036
(202) 861-1500

Attorneys for Respondents North American Bus Industries, Inc. and North American Bus Industries Kft.

Amelia Toy Rudolph
Counsel of Record
Drew D. Dropkin
SUTHERLAND ASBILL
& BRENNAN LLP
999 Peachtree St., N.E.
Atlanta, GA 30309-3996
(404) 853-8000

Steuart H. Thomsen
SUTHERLAND ASBILL
& BRENNAN LLP
1275 Pennsylvania Ave., N.W.
Washington, DC 20004
(202) 383-0100

Attorneys for Respondent Deloitte & Touche USA LLP

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

QUESTIONS PRESENTED

1. Did the Court of Appeals correctly hold, consistent with the holdings of every Court of Appeals to consider the issue, that in False Claims Act (FCA) cases in which the Government declines to intervene, the date the Government learns of an alleged FCA violation is immaterial to the statute of limitations analysis?

2. Did the Court of Appeals correctly hold that alleged misrepresentations in a petition for agency action were not material under the FCA, when no evidence was presented suggesting that the petition might have been denied but for the alleged misrepresentations?

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STATEMENT

Petitioner Thornton G. Sanders ("Petitioner") asks the Court to grant certiorari to adopt two interpretations of the False Claims Act ("FCA"), 31 U.S.C. §§ 3729 *et seq.*, that have been rejected by every United States Court of Appeals to consider them. First, Petitioner would have the Court hold that the FCA statute of limitations depends on the date the Government learns of the alleged violation, even if the Government declines to intervene. Second, Petitioner would have the Court hold that a false statement need not be material to form the basis for an FCA claim.

Petitioner also asserts, in his final question presented, that he would ask the Court to overrule its own decision in *Graham County Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 545 U.S. 409 (2005), but he makes no argument in support of his request.

Petitioner's statement and questions presented are replete with misrepresentations and distortions of the record, particularly with respect to the materiality issue. An accurate recitation of the salient facts is set forth below.

A. Background

Respondent North American Bus Industries, Inc. ("NABI Inc.") manufactures transit buses for sale and distribution to municipalities and transit authorities throughout the United States. These buses are ordered, manufactured, and sold pursuant

to contracts between NABI Inc. and various municipalities and transit authorities.

The buses are manufactured in a two-step process. First, North American Bus Industries, Kft. (known as North American Bus Industries, Rt. during the time period relevant to this litigation, referred to herein as "NABI Hungary" and collectively with NABI Inc. as "NABI"), which was the parent of NABI Inc. during the relevant time period, partially assembles and then ships the incomplete buses to the United States for final assembly at NABI Inc.'s plant.

Petitioner was hired as Vice President and Chief Financial Officer of NABI Inc.'s predecessor corporation in April 1993. In June 1994, Petitioner received the additional titles of President and Director. NABI's Board of Directors fired Petitioner in 1997 after Petitioner's attempt to orchestrate a hostile takeover of NABI failed. While Petitioner implies that he was fired because "he raised questions about the legality" of NABI's valuation of the imported buses, Petition for Writ of Certiorari ("Pet. Br.") at 4, the Court of Appeals correctly noted that Petitioner was fired shortly after he "proposed that the company be sold to a group of investors that included himself and NABI's other senior managers." App. 7. Indeed, the Court of Appeals highlighted that Petitioner himself was well aware of the falsity of his implication in that he "subsequently wrote a letter to another NABI employee stating that he had been fired because executives at NABI Hungary viewed [Petitioner's]

proposed purchase of the company as an act of disloyalty." App. 7.

B. The June 1998 Customs Protest

In June 1998, NABI, with the assistance of its Customs broker, Respondent Deloitte & Touche USA, LLP ("Deloitte"), filed a protest with the United States Customs Service ("Customs") challenging Customs' classification of the imported buses. At the time of the protest, the bus shells were classified under subheading 8707.90.50 of the Harmonized Tariff Schedule of the United States ("HTS"), which provides for "Bodies (including cabs), for motor vehicles of headings 8701 to 8705." The protest asserted that the buses should instead be classified under subheading 8702.10.30, which provides for "Motor vehicles [with diesel engine] designed for the transport of 16 or more persons including the driver."

The basis for NABI's protest was General Rule of Interpretation 2(a) of the HTS, which provides that "[a]ny reference in a heading to an article shall be taken to include a reference to that article incomplete or unfinished, provided that, as entered, the incomplete or unfinished article has the essential character of the complete or finished article." Based on this rule, NABI contended that the bus shells imported from Hungary had the essential character of finished buses. As persuasive authority, NABI cited Customs' Headquarters Ruling Letter NY882788, which noted that General Rule of Interpretation 2(a) applies to such incomplete or unfinished articles "whether imported unassembled or not."

Among the facts and arguments in NABI's protest were the enumeration of 20 components that were imported with the bus. While Petitioner claims that four of those components—the front suspension, rear suspension, power steering, and brake chamber—were "not complete or not imported with the shells," his assertion distorts the record. Petitioner's own witnesses admitted that (i) all components of the front and rear suspension were shipped with the bus, and portions were installed; (ii) the bus contained, at the time of importation, a steering mechanism consisting of the permanent steering column, a steering wheel, the steering gear box, and linkage to the front wheels; and (iii) the bus was imported with brake chambers on the axles.[1]

On November 20, 1998, Customs issued a ruling upholding NABI's protest and agreeing that the proper classification of the bus shells was as unfinished motor vehicles. Other than repeating NABI's factual assertion regarding the imported components, Customs' ruling made no mention of this fact in its ruling. The only reference in Customs' analysis to the condition of the NABI buses at the time of importation was the observation that "[t]he bus shells when imported contain a

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[1] NABI's former Vice President of Engineering, Richard Cooper, whom Sanders initially designated as a hybrid fact/expert witness, testified that the suspension system "had the parts with it, but they weren't installed"; that the steering mechanism at importation "consisted of the permanent steering column, a steering wheel (which was removed and painted, a horn button added and reinstalled) the steering gear box and the drag link to the front wheels"; and that the axles "came in with brake chambers."

substantial amount of equipment and number of components necessary for a completed transit bus."

In support of its summary judgment motion, NABI submitted the expert report of Stuart P. Seidel, an expert in Customs law with 37 years of experience in Customs and International Trade. Mr. Seidel observed that neither the HTS nor the Harmonized Commodity Description and Coding System Explanatory Notes, the principal interpretative aid used in interpreting the HTS, contains any requirement that the components be installed, only that the imported object have the essential character of the finished vehicle. Mr. Seidel opined that the unfinished buses had the essential character of a bus, and that they were entitled to the treatment requested in NABI's protest. Petitioner offered no admissible testimony to rebut Mr. Seidel's opinion.

Because NABI did not seek summary judgment as to the truth of its representations to Customs, the District Court and the Court of Appeals were required to assume their falsity in evaluating whether they were material for purposes of NABI's motion. Petitioner's repeated assertions that NABI "lied" and engaged in "fraud," however, have not been proven, and NABI vigorously disputes Petitioner's contention that it made *any* false statements to the Government.

C. Petitioner's Lawsuit

During the course of the litigation in the District Court, the Government *twice* declined to intervene. Petitioner's initial Complaint was filed in

September 2002, five years after he had been fired following his unsuccessful hostile takeover bid. In the initial Complaint, Petitioner alleged a single FCA violation: that NABI had allegedly made false certifications that it qualified for Buy America grants or subsidies under 49 U.S.C. § 5323(j) and 49 C.F.R. Part 661. The U.S. Department of Justice ("DOJ") conducted an investigation into Petitioner's allegations and, in February 2004, declined to intervene.

In June 2004, Petitioner filed a First Amended Complaint alleging additional FCA violations, including alleged misrepresentations in NABI's June 1998 Customs protest. Approximately two months later, DOJ again declined to intervene.

In June 2005, Petitioner amended his complaint yet again, this time adding Deloitte as a defendant based on its role in the Customs protest seven years earlier. Petitioner did not assert any claims against Deloitte relating to NABI's Buy America certifications.

In December 2005, the District Court granted Deloitte's motion to dismiss on statute of limitations grounds. The District Court correctly held that the FCA statute of limitations requires a relator to bring his or her action within six years of the alleged FCA violation in cases in which the Government declines to intervene.

In the fall of 2006, Petitioner and NABI filed cross-motions for summary judgment. In December 2006, after the parties' cross-motions for summary judgment had been fully briefed and argued before

the District Court, DOJ asked the District Court to delay its ruling on the motions to allow DOJ to *consider* intervening. Despite Petitioner's misleading implication otherwise, the DOJ's request never suggested that Petitioner's allegations, which had then been pending for more than four years, had caused Customs to reconsider its ruling on NABI's 1998 protest. The District Court denied DOJ's request for more time, noting that since DOJ had "received copies of all the electronic filings in this case," had made no effort to intervene while the motions were pending, and "chose not to attend" the hearing on the motions, "the time has come for this court to rule without hearing from the United States." App. 36.

In January 2007, the District Court denied Petitioner's motion for summary judgment and partially granted NABI's motion. App. 34-41. The District Court granted NABI's motion as to Petitioner's claims arising out of the Customs protest on the grounds that the alleged misstatements were not material. App. 37-40. The District Court denied NABI's motion as to Petitioner's Buy America claim, but held that because Petitioner could not establish harm to the Government even if NABI's Buy America certification were found knowingly false, Petitioner could recover only statutory damages. App. 36-37. In May 2007, NABI filed a final summary judgment motion as to the Buy America claim. In June 2007, the District Court granted NABI's motion, holding that this claim was time-barred under the FCA's six-year statute of limitations. App. 30-33.

In August 2007, Petitioner noticed his appeal to the Court of Appeals. In March 2008, after the appeal had been briefed, Petitioner sent a letter to the Court of Appeals purporting to be a submission of supplemental authority pursuant to Fed. R. App. P. 28(j). The letter offered no new legal authority, but instead requested that the Court of Appeals take judicial notice of U.S. trade data showing that Customs had changed its classification of buses imported in December 2007 by NABI. These buses were not the same buses at issue in the appeal; rather, they had been built according to different specifications due to requirements of municipality contracts not involved in the appeal, and therefore were imported with different component parts installed.

In October 2008, Petitioner filed a motion asking the Court of Appeals to take judicial notice of an affidavit filed by the Department of Homeland Security, Immigration and Customs Enforcement ("ICE") to obtain a search warrant of NABI. The affidavit, like the U.S. trade data Petitioner submitted in March 2008, related to buses imported between 2006 and 2008—again, pursuant to different contracts and different specifications than the buses involved in the appeal. App. 66-75. While the affidavit asserted an ICE agent's legal opinion that NABI had made material false statements in its 1998 protest regarding certain components, App. 76, the affidavit was based solely on an examination of

the buses imported in 2006 or later.[2]

On November 5, 2008, the Court of Appeals unanimously affirmed the District Court's grant of summary judgment for NABI and dismissal of Deloitte, holding, *inter alia*, that the district court had correctly applied both the statute of limitations provision and the materiality requirement of the FCA. App. 1-27. In its opinion, the Court of Appeals expressly declined to consider the purported "supplemental authority" submitted by Petitioner, stating that the documents "are not part of the record before us, and we refuse to speculate as to the potential outcome of any ongoing investigations. . . . We hold only that on the record in this case, the district court properly granted the defendants' motions to dismiss and for summary judgment." App. 27.

Petitioner filed a petition for rehearing en banc in the Court of Appeals on November 18, 2008. No active judge of the Court of Appeals requested a poll on whether to rehear Petitioner's appeal en banc, and the Court of Appeals denied Petitioner's petition for rehearing en banc on January 7, 2009. This petition for writ of certiorari followed.

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[2] Moreover, the ICE agent's analysis in the affidavit contained serious misstatements that render the affidavit incorrect and inaccurate. Most importantly, the ICE agent incorrectly suggested that there was a 1998 binding ruling under 19 C.F.R. § 177 that applied to future imports when no such ruling exists. The 1998 Protest Decision was issued pursuant to 19 C.F.R. § 174, which has only retroactive, not prospective, effect. Under the plain language of the statute, Protest Decisions pursuant to 19 C.F.R. § 174 cannot govern the filing of future entries.

ARGUMENT

D. No Compelling Reasons Exist for This Court to Review the Court of Appeals' Interpretation of the FCA's Statute of Limitations.

Petitioner argues that the "lower courts are in a state of chaos" as to the proper interpretation of 31 U.S.C. § 3731(b)(2), which permits the filing of an FCA action up to three years after material facts "are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances," but in no event more than 10 years after the violation occurs. Pet. Br. 11. Petitioner furthers argues that the Court should resolve this "chaos" by adopting a "uniform ten-year statute of limitations in non-intervened cases where there is no evidence of government knowledge of the fraud," effectively overriding the six-year statute of limitations set forth in 31 U.S.C. § 3731(b)(1). Pet. Br. 10.

No "compelling reasons" exist for this Court to review the Fourth Circuit's interpretation of the FCA's statute of limitations in this case. *See* S. Ct. R. 10. In fact, three considerations weigh strongly against this Court's exercise of its judicial discretion to grant Petitioner's request for review. First, Petitioner is wrong when he suggests that the law is in a "state of chaos"; in fact, not a single Court of Appeals has adopted the interpretation of 31 U.S.C. § 3731(b)(2) that Petitioner urges upon the Court. Second, the Court of Appeals' decision in this case—which embodies the clear majority view regarding the application of 31 U.S.C. § 3731(b)(2) in relator-filed actions in which the Government declines to intervene—is manifestly correct. Third, as

Petitioner candidly admits, pending legislation before Congress, if enacted, would immediately eliminate the statutory language that Petitioner asks this Court to interpret.

1. No United States Court of Appeals Has Interpreted the FCA's Limitations Provision in the Manner Petitioner Proposes.

Not one Court of Appeals has adopted the interpretation Petitioner advances. Consistent with the Fourth Circuit's decision below, the Court of Appeals for the Fifth and Tenth Circuits have held that § 3731(b)(2) does not apply in relator-filed cases in which the Government declines to intervene. In such cases, the Fourth, Fifth, and Tenth Circuits have held, relators' FCA claims are subject to the six-year limitations period of § 3731(b)(1). *U.S. ex rel. Erskine v. Baker*, No. 99-50034, 2000 WL 554644, at *1 (5th Cir. Apr. 13, 2000); *U.S. ex rel. Sikkenga v. Regence Bluecross Blueshield of Utah*, 472 F.3d 702, 724-25 (10th Cir. 2006).[3] The Courts of Appeals for the Third and Ninth Circuits have held that § 3731(b)(2) applies in relator-filed, non-intervened cases, but that the relator—rather than a government employee—is the individual on whose knowledge the limitations period depends. *U.S. ex rel. Malloy v. Telephonics Corp.*, 68 F. App'x 270, 272-73 (3d Cir. 2003); *U.S. ex rel. Hyatt v. Northrop*

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[3] In similar fashion, the Eleventh Circuit has applied § 3731(b)(1)'s six-year statute of limitations to a relator-filed FCA action in which the Government did not intervene without discussing the possible application of § 3731(b)(2)'s longer limitations period. *See Foster v. Savannah Commc'n*, 140 F. App'x 905, 907-08 (11th Cir. 2005).

Corp., 91 F.3d 1211, 1217-18 (9th Cir. 1996). Although these two approaches differ slightly,[4] all five Courts of Appeals to have addressed the issue have rejected the interpretation that Petitioner implores this Court to adopt: that § 3731(b)(2) applies in relator-filed actions in which the Government elects not to intervene, and that the knowledge of the Government, a nonparty, determines the timeliness of the relators' claims under § 3731(b)(2).[5]

2. The Fourth Circuit's Opinion Is Manifestly Correct.

By joining the Third, Fifth, Ninth and Tenth Circuits in rejecting Petitioner's interpretation of § 3731(b)(2), the Court of Appeals for the Fourth Circuit reached the manifestly correct result in this case. The Court of Appeals began by focusing on the plain language of § 3731(b)(2), which refers to "the United States" (rather than relators) and to government officials who are "charged with responsibility to act in the circumstances." App. 11-12. Because "the United States" does not prosecute relator-filed FCA actions in which it does not

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[4] Petitioner does not argue that he would benefit from the Third and Ninth Circuits' approach. Even under that approach, Petitioner's claims are time-barred, because Petitioner knew of the material facts underlying his claims more than three years before he filed his FCA action.

[5] Petitioner musters only six district court opinions in the last 25 years to support this interpretation of § 3731(b)(2). *See* Pet. Br. at 15 (citing *Pogue*, *Lewis*, *Gonzalez*, *Salmeron*, *Kreindler*, *Colunga*). One of those opinions, *United States ex rel. Colunga v. Hercules, Inc.*, No. 89-CV-954, 1998 WL 310481 (D. Ut. Mar. 6, 1998), has been overruled by the Court of Appeals for the Tenth Circuit in *Sikkenga*.

intervene, and because government officials are not "charged with the responsibility" to ensure that relators file timely FCA actions in which the Government does not intervene, the Court of Appeals relied on these textual elements of § 3731(b)(2) to reject Petitioner's interpretation. App. 12. In further support of its interpretation of § 3731(b)(2)'s plain language, the Fourth Circuit analyzed the statute upon which § 3731(b)(2) was modeled[6] and invoked this Court's recent holding that § 3731(b)'s introductory phrase "any civil action under section 3730" does not necessarily refer to all FCA actions.[7] App. 12-14. Having marshaled copious support for its interpretation, the Court of Appeals concluded its analysis by observing that its interpretation was "decidedly the majority approach in the federal courts of appeal" and that "[t]he majority of district courts in [the other] circuits . . . are also in accord with our interpretation." App. 16, 17.

The Court of Appeals' interpretation, as the Fourth Circuit aptly noted, is also the only interpretation that makes sense. If the Fourth Circuit had adopted Petitioner's interpretation, it would have created the bizarre scenario in which the timeliness of a plaintiff's action depends entirely on the knowledge of a nonparty. App. 11. Such a result would be extraordinary in virtually any context, but it is particularly unworkable here, where the timeliness of the relator's claims would depend on the knowledge of the Government. In such a

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[6] 28 U.S.C. § 2416(c).

[7] *Graham County Soil & Water Conversation Dist. v. U.S. ex rel. Wilson*, 545 U.S. 409 (2005).

scenario, even after the Government has affirmatively chosen not to intervene in a relator's FCA action, DOJ and executive agencies would be disrupted by defendants' efforts to obtain discovery regarding (i) the identity of "the official of the United States charged with responsibility to act in the circumstances" as well as (ii) the time when individuals who arguably qualify as "the official of the United States charged with responsibility to act in the circumstances" knew, or reasonably should have known, of the facts material to the relator's action. The Government, in response, could then thwart defendants' legitimate efforts to advance a statute of limitations defense by contending that the Government is not subject to party discovery under the Federal Rules of Civil Procedure.[8]

In addition to being the only sensible interpretation of § 3731(b)(2), the Fourth Circuit's

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[8] Instead of obtaining party discovery from the Government under Rules 26 through 37 of the Federal Rules of Civil Procedure when the Government declines to intervene, an FCA defendant must comply with the appropriate federal agency's regulations, commonly known as *Touhy* regulations, that establish the scope of and method for obtaining discovery from the agency. *See U.S. ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951); *see also, e.g., U.S. ex rel. Farrell v. SKF USA, Inc.*, No. 94-CV-157A, 1998 WL 265242, at *3-*4 (W.D.N.Y. May 18, 1998) (applying *Touhy* in relator-filed FCA action in which Government declined to intervene); *U.S. ex rel. Lamers v. City of Green Bay*, 924 F. Supp. 96, 97-98 (E.D. Wis. 1996) (same). Then, if the defendant wishes to challenge the agency's decision regarding the scope of permissible discovery or the method for obtaining it, the defendant must pursue an agency-level appeal and, if still unsatisfied, must file a separate action in federal court seeking further review. *See, e.g., U.S. ex rel. Walker v. R & F Props.*, No. 5:02-cv-131, 2008 WL 906734, at *2 (M.D. Fla. Apr. 2, 2008).

interpretation comports with the purpose of the FCA's *qui tam* provisions. The FCA seeks to combat fraud quickly and efficiently by encouraging relators to file suit promptly after they become aware of fraudulent conduct. *See U.S. ex rel. Marcus v. Hess*, 317 U.S. 537, 547 (1943). By contrast, Petitioner's interpretation of § 3731(b)(2)—which allows relators unilaterally to extend the statute of limitations from six to ten years simply by withholding their information about fraudulent conduct from the Government[9]—would enable relators to, as the Fourth Circuit fittingly described it, "sit on their claims." App. 15. As those claims build up over ten years while the fraud continues unabated, the relator's potential bounty under the FCA builds up as well, but at the expense of the Government's ability to bring criminal fraud prosecutions (which are subject to a shorter limitations period) and at the expense of the FCA's stated objective of promoting the swift eradication of fraud.[10] The Fourth Circuit's

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[9] According to Petitioner, in a typical FCA case, "the government is unaware of the fraud until a relator blows the whistle." Pet. Br. 12.

[10] Although Petitioner suggests, without support, that a relator's undue delay in filing an FCA action is not a "common event" and is purely a "hypothetical concern," Pet. Br. 12, many FCA cases illustrate that a delay of months or years is not rare. *See, e.g.*, *U.S. ex rel. Lowman v. Hilton Head Health Sys., L.P.*, 487 F. Supp. 2d 682, 696-97 (D.S.C. Apr. 24, 2007) (relator was hired in March 1997, learned of the material facts shortly after he began his employment, but did not file suit until September 2005, more than eight years later), *aff'd*, No. 07-1485 (4th Cir. Nov. 18, 2008); *U.S. ex rel. Koch v. Koch Indus., Inc.*, 188 F.R.D. 617, 639-40 (N.D. Okla. 1999) (relator knew in 1983 that defendants were training employees to "cheat" producers, was informed of fraudulent measurement practices in 1984, but did not file his FCA action until 1991).

interpretation of § 3731(b)(2) is not only thorough and well-reasoned, but also consistent with both common sense and the goal of the FCA.

3. Pending Legislation, If Enacted, Would Immediately Eliminate the Statutory Language That Petitioner Asks the Court to Interpret in This Appeal.

The False Claims Act Clarification Act of 2009, S. 458, 111th Cong. § 1 (2009) ("the 2009 Act"), is pending in Congress and, if enacted, would eliminate the statutory language that Petitioner asks the Court to interpret in his request for certiorari.

The 2009 Act would replace the FCA's current statute of limitations framework with a new—and simplified—ten-year statute of limitations. The FCA currently provides for a six-year statute of limitations, 31 U.S.C. § 3731(b)(1), which is supplemented in certain actions by a three-year tolling period and a ten-year statute of repose, 31 U.S.C. § 3731(b)(2). By contrast, the 2009 Act's proposed statute of limitations would provide simply that "[a] civil action under section 3730 may not be brought more than 10 years after the date on which the violation of section 3729 or 3730 is committed." The False Claims Act Clarification Act of 2009, S. 458, 111th Cong. § 6 (2009), available at 155 Cong. Rec. S2424 at S2427 (Feb. 24, 2009). Notably, the 2009 Act contains no tolling provision and no statute of repose whatsoever.

By jettisoning the tolling and repose provisions currently found in 31 U.S.C. § 3731(b)(2),

the 2009 Act's proposed statute of limitations bears no resemblance to the statutory language at issue here, a fact that Petitioner acknowledges on two separate occasions. He concedes in his Petition that "[l]egislation has been introduced in Congress which would . . . creat[e] a uniform statute of limitations for all causes of action" (Pet. Br. 2) and that "Congress is again considering legislation that would eliminate any confusion caused by the current statute by creating a uniform ten-year limitations period" (Pet. Br. 17).

With Congress having already embarked on a path to supersede § 3731(b)(2) with a new FCA statute of limitations provision, no "compelling reasons" exist for the Court to grant the Petition and to accept Petitioner's invitation to interpret potentially soon-to-be-outdated statutory language. *See* S. Ct. R. 10. Even assuming, solely for the sake of argument, that certain members of Congress are displeased with unidentified court decisions interpreting § 3731(b)(2) in an unspecified way,[11] the

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[11] In his Petition, Petitioner distorts the legislative history surrounding recent efforts to amend the FCA. Petitioner contends that these efforts reflect Congress's attempt "to correct [the Fourth Circuit's] and other erroneous court interpretations" of § 3731(b)(2), Pet Br. 17, and to support this bold assertion, Petitioner quotes Senator Charles Grassley's statement that "[r]ecent decisions by Federal courts" threaten to undermine the spirit and intent of the FCA. Pet. Br. 17 n.5. What Petitioner fails to tell the Court, however, is that Senator Grassley went on to identify—with specificity and by name—the "recent decisions by Federal courts" to which he was referring. First, he identified *United States ex rel. Totten v. Bombardier Corp.*, 380 F.3d 488 (D.C. Cir. 2004), which held

2009 Act illustrates beyond any doubt that Congress is keenly aware of—and actively considering changes to—the FCA's limitations period. With the currently pending 2009 Act in mind, no "compelling reason" exists for the Court to grant Petitioner's request to interpret statutory language that—by Petitioner's own admission—may be on the verge of extinction.

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that false claims presented to Government grantees were not actionable under the FCA because they had not been presented to the Government. 153 Cong. Rec. S11506 at S11506 (Sept. 12, 2007) (remarks of Senator Grassley). Second, he cited *Rockwell International Corp. v. United States*, 549 U.S. 457 (2007), which adopted a broad interpretation of the FCA's public disclosure bar. *Id.* at 11506-07. Third, and finally, he identified *United States ex rel. DRC, Inc. v. Custer Battles, LLC*, 444 F. Supp. 2d 678 (E.D. Va. 2006), which held that the FCA did not reach nontaxpayer funds that have been placed under the trust and administration of the Government. *Id.* at 11507. Speaking of these three cases, Senator Grassley then proclaimed that "*[t]hese decisions* . . . are contrary to the spirit and intent of the 1986 amendments [to the FCA]." *Id.* (emphasis added).

Senator Grassley then proceeded to explain how the substantive changes in the proposed legislation addressed *Totten*, *Rockwell*, and *DRC*. None of these cases deals with the FCA's statute of limitations. In fact, only after describing at length the substantive changes proposed in the legislation to address *Totten*, *Rockwell*, and *DRC* did Senator Grassley mention in passing that "the bill makes . . . a *technical-correcting* amendment that *clarifies* the statute of limitations" to "*streamline* the procedures for filing." *Id.* (emphasis added). Senator Grassley did not suggest that any federal court has erroneously interpreted § 3731(b)(2), and he certainly did not suggest that the Fourth Circuit has wrongly applied § 3731(b)(2). Petitioner's reliance on recent legislative history regarding potential amendments to the FCA is misguided and misleading.

E. There Is No Dispute Among the Courts of Appeals Regarding the Existence of an FCA Materiality Requirement, and the Court of Appeals Below Correctly Applied the Standard Petitioner Advocates.

Petitioner presents three arguments for granting his petition with respect to the FCA's materiality requirement, none of which rises to the level of a "compelling reason" for a writ of certiorari. First, he would ask the Court to hold that no materiality requirement exists, even though every U.S. Court of Appeals to decide the issue has found such a requirement. Second, Petitioner would ask the Court to resolve a nonexistent conflict regarding the appropriate materiality standard by *affirming* the standard articulated below. Third, Petitioner would ask the Court to hold that the Court of Appeals below misapplied its own standard. None of these arguments merits the Court's attention.

1. Every Court of Appeals to Consider the Issue Has Found a Materiality Requirement in the FCA.

In asking the Court to hold that the FCA contains no materiality requirement, Petitioner would have the Court overrule the holdings of the Courts of Appeals for the Fourth, Sixth, Seventh,

Ninth, and Tenth Circuits.[12] No Court of Appeals has adopted Petitioner's view.

Petitioner relies on the Court's opinions in *United States v. Wells*, 519 U.S. 482 (1997), and *Neder v. United States*, 527 U.S. 1 (1999), for the proposition that the FCA fails the appropriate analysis for determining whether materiality is required by a statute. Pet. Br. 19. In *Wells*, the Court established a three-step framework by which courts should interpret statutes: (i) a natural reading of the full text; (ii) the common law meaning of the statutory terms; and (iii) consideration of the statutory and legislative history for guidance. 519 U.S. at 490-92. The Court concluded in *Wells* that the federal crime of knowingly making a false statement to a federally insured bank does not include a materiality element. *Id.* at 484. In *Neder*, the Court applied the *Wells* framework and concluded that the federal crimes of mail fraud, wire fraud, and bank fraud include a materiality requirement. 527 U.S. at 21-23.

While Petitioner invokes the *Wells-Neder* analysis to support the exclusion of a materiality requirement from the FCA, two Courts of Appeals have held that the same analysis mandates the

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[12] *U.S. ex rel. Berge v. Trustees of Univ. of Ala.*, 104 F.3d 1453, 1459 (4th Cir. 1997); *U.S. ex rel. A+ Homecare, Inc. v. Medshares Mgmt. Group, Inc.*, 400 F.3d 428, 445-46 (6th Cir. 2004), *cert. denied*, 546 U.S. 1063 (2005); *United States v. Rogan*, 517 F.3d 449, 452 (7th Cir. 2008); *United States v. Bourseau*, 531 F.3d 1159, 1171 (9th Cir. 2008), *cert. denied*, 129 S. Ct. 1524 (2009); *U.S. ex rel. Bahrani v. Conagra, Inc.*, 465 F.3d 1189, 1204 (10th Cir. 2006), *cert. denied*, 128 S. Ct. 388 (2007).

opposite result. In *A+ Homecare,* the court held that under the first *Wells-Neder* step, "[a] natural reading of the statutory text . . . supports the implication of a materiality element." 400 F.3d at 442. The court recognized specifically that the first, second, and seventh subsections of 31 U.S.C. § 3729(a)—the three subsections on which Petitioner focuses his argument (Pet. Br. 20-23)—all require that a claim itself be fraudulent or used for fraudulent purposes, and not merely that the claim contain a false statement. *A+ Homecare,* 400 F.3d at 442-43. "A false statement within a claim can only serve to make the entire claim itself fraudulent if that statement is material to the request or demand for money or property." *Id.* at 443.

The court similarly applied the second and third steps of *Wells-Neder.* Regarding the second step, the court held that "the common-law definitions of the terms 'false' and 'fraudulent' are consistent with including materiality as an element of the FCA." *Id.* at 444. The court distinguished the FCA from the statute in *Wells,* which criminalizes "knowingly making a false statement" (18 U.S.C. § 1014), on the ground that in the FCA, "liability is imposed based on the use of the false statement in relation to the fraudulent claim"—*e.g.*, to obtain payment or avoid an obligation to the government—"rather than simply because a false statement was made." 400 F.3d at 443-44. Regarding the third step—the legislative history, the court noted the 1986 Senate report of amendments to the FCA referenced the addition of a reverse false claim provision "to provide that an individual who makes a *material misrepresentation* to avoid paying money

owed the Government would be equally liable under the Act as if he had submitted a false claim to receive money." *Id.* at 444 (quoting S. Rep. No. 99-345, at 18 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5283 (emphasis added by court)).

Thus, the court determined that all three steps of the *Wells-Neder* framework implicate an FCA materiality requirement. 400 F.3d at 442-44; *see also Bourseau,* 531 F.3d at 1170-71 (adopting reasoning in *A+ Homecare*). Petitioner has offered the Court no persuasive reason to disturb that analysis.

2. There is No Conflict Among Courts of Appeals Appropriate for Resolution in This Action.

Moreover, Petitioner has taken the unusual position of asking the Court to resolve a "circuit split" regarding the proper materiality standard in *favor* of the Court of Appeals below. Petitioner argues that certiorari is necessary so that the Court may reject a so-called "outcome materiality" test Petitioner claims was adopted in the Eighth Circuit in *Costner v. URS Consultants, Inc.*, 153 F.3d 667 (1998), in favor of the standard used by the Courts of Appeals in this action and in every other FCA materiality opinion: "whether the false statement has a natural tendency to influence agency action or is capable of influencing agency action." Pet. Br. 18-19 (quoting *Berge,* 104 F.3d at 1459). In reality, no such conflict exists.

In *Costner*, as Petitioner notes, the court held that the FCA is limited to actions "which have the

purpose and effect of causing the United States to pay out money it is not obligated to pay, or those actions which intentionally deprive the United States of money it is lawfully due." 153 F.3d at 677. The context of the court's holding in *Costner*, however, was not whether the statements were material, but whether they were, in fact, "claims." *Id.* The effect of the court's statement was to limit the FCA to actions that affect the coffers of the United States, and to exclude the plaintiff's actions with respect to claims made against a trust fund underwritten by a private party. *Id.* The words "material" and "materiality" do not appear in *Costner*, and nothing in *Costner* or any other court of appeals decision contradicts the so-called "natural tendency" test for materiality.

Even if there were a conflict between *Costner* and other decisions, certiorari to resolve the conflict in this case would be inappropriate. The Court of Appeals below articulated the "natural tendency" test, and NABI agrees that this is the appropriate standard. App. 19. Presumably, Petitioner agrees. It is difficult to fathom why the Court should grant certioriari to affirm a standard as to which all parties and the Court of Appeals are in agreement.

3. Petitioner's Claim That the Court of Appeals Misapplied the Materiality Standard is Neither Meritorious Nor Appropriate for the Court's Consideration.

Petitioner's real complaint is that he believes the Court of Appeals misapplied the "natural tendency" test and instead applied an "outcome

materiality" test, and therefore "the Court should grant the Petition if only to give guidance to the lower courts on the proper application of the 'natural tendency' test." Pet. Br. 28. Even if Petitioner were correct, and the Court of Appeals had misapplied the test, there would be no basis for granting Petitioner's Petition. While Petitioner quarrels with the result below, he makes no suggestion that improper application of the "natural tendency" test is widespread; he does not cite a single opinion other than the decisions below in which he believes the test was misapplied. The relief Petitioner seeks thus would have little, if any, impact beyond this particular lawsuit—and is thus a classic example of an inappropriate focu of the Court's attention.

Finally, Petitioner is *not* correct; the Court of Appeals' application of the "natural tendency" test was entirely proper. Petitioner presented no evidence of what Customs "could" or "would" have done in the absence of a given representation, instead arguing that the purported impossibility of such a determination entitled him to avoid summary judgment. Petitioner asks: "How could the court possibly know whether the false claims could not have affected the classification decision?" Pet. Br. 26.

One way the court may have known that Customs' decision could not have been affected was through the review of expert testimony about the factors important to Customs in classifying imports. Petitioner presented none. NABI presented the uncontroverted testimony of a Customs law expert

that the buses were properly classified, and any other classification would have been improper.

Another way the court was able to determine the immateriality of the representations was through the exercise of logic and common sense. The Court of Appeals recognized that "even when the evidence in the record is viewed generously in Sanders' favor, it is clear that the protest at most contained minor deficiencies." App. 21. The court added that "the question for Customs was not whether every component and subcomponent in the protest was present, but whether the bus shells had the 'essential character' of buses. . . . [W]e find no reason to believe that the particulars proffered by Sanders had any bearing on Customs' holistic analysis." App. 22-23.

The only evidence Petitioner offered for the proposition that the representations were material was that NABI made them. Pet. Br. 26. Putting aside Petitioner's blatant misrepresentation of the record with respect to the origin of the representations and NABI's intent, Petitioner's argument amounts to a contention that all false representations must be material, because the defendant would not have made them if it did not believe they were necessary to influence the agency's decision. This argument effectively reads the materiality requirement out of the FCA—an approach that, as shown above, has been consistently rejected.

Neither is there merit to Petitioner's complaint that the Court of Appeals' decision "gives no guidance to future courts" because "[t]here is no

way to determine from the Panel's decision how many lies would be material." Pet. Br. 27-28. With good reason, courts are reluctant to decide issues that are not before them. What purpose would have been served by remanding for the Court of Appeals to specify the number of components that would have had to be absent from NABI's buses for a representation about their presence to be material? Even in the unlikely event that a future FCA materiality case happens to involve representations to Customs about the number of components imported with a bus, Petitioner admits that some components are more important to the "essential character" of a bus than others. *See* Pet. Br. 25 (components at issue "were four of the most important operating systems containing many components and subcomponents").

Finally, the Court of Appeals' refusal to consider the affidavit used to secure a search warrant of NABI's facility, which was submitted after briefing had been completed, did not improperly affect the court's decision. Petitioner's statement that "[t]he search warrant reflects Customs' belated investigation of Sanders' allegations and concludes that he was correct" (Pet. Br. 26) is simply false. The search warrant affidavit, executed by an agent with the Department of Homeland Security, Immigration and Customs Enforcement who was not subject to cross-examination, and thus was permitted to contain extensive hearsay, contains no evidence or allegation from any individual purporting to have knowledge of Customs' classification process. While Petitioner chastises the Court of Appeals for "refus[ing] to

speculate as to the potential outcome of any ongoing investigations," App. 27, it would have been patently unfair to reverse a grant of summary judgment based on an out-of-court statement irrelevant to the factual matters at issue in the case, submitted long after the record was complete. At a minimum, the refusal to take judicial notice was an appropriate exercise of the Court of Appeals' discretion.

CONCLUSION

For the reasons set forth herein, NABI and Deloitte respectfully request that the petition for writ of certiorari be denied.

Respectfully submitted,

JAMES P. ULWICK
Counsel of Record
KRAMON & GRAHAM, P.A.
One South St, Suite 2600
Baltimore, MD 21202
(410) 752-1269

MELISSA H. MAXMAN
RONALD F. WICK
BAKER & HOSTETLER LLP
Washington Square,
Suite 1100
1050 Connecticut
Avenue, N.W.
Washington, DC 20036
(202) 861-1500

Attorneys for
Respondents North
American Bus Industries,
Inc. and North American
Bus Industries Kft.

AMELIA TOY RUDOLPH
Counsel of Record
DREW D. DROPKIN
SUTHERLAND ASBILL
& BRENNAN LLP
999 Peachtree St., N.E.
Atlanta, GA 30309-3996
(404) 853-8000

STEUART H. THOMSEN
SUTHERLAND ASBILL
& BRENNAN LLP
1275 Pennsylvania
Avenue, N.W.
Washington, DC 20004
(202) 383-0100

Attorneys for
Respondent
Deloitte & Touche USA
LLP